

In the Matter of Merchant Mariner's License No. A-17001
Issued to: GEORGE W. WILSON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

362 A

GEORGE W. WILSON

This appeal comes before me in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 29 March, 1949, Appellant appeared before an Examiner of the United States Coast Guard at Detroit, Michigan, to answer to a charge of "negligence" supported by the following specifications:

"First Specification: In that you, while serving as Master and in charge of navigation on board a merchant vessel of the United States, the S.S. DETROIT, under authority of your duly issued License/Certificate, did, on or about 8 August 1948, being underway and upbound in Detroit River, and you had blown a one blast passing signal to downbound SS EDWARD N. SAUNDERS, JR., to which you did not receive a reply, neglect to establish a passing agreement with said vessel, as required by Sec. 322.4 of the Pilot Rules for the Great Lakes, before continuing your upbound course in Detroit River.

"Second Specification: While serving as above stated did, on or about 8 August 1948 being underway and upbound in Detroit River, neglect to obey Sec. 322.2 of the Pilot Rules for the Great Lakes when you did not understand the course or intentions of SS EDWARD N. SAUNDERS, JR., which was downbound in Detroit River at the same time and date and blew you a two blast passing signal to which you did not answer, and through such neglect did contribute to the collision of SS DETROIT with SS EDWARD N. SAUNDERS, JR., that occurred in Detroit River at or about 2310 Eastern Standard Time, 8 August 1948."

At the hearing, Appellant was given a full explanation of the nature of the proceedings; the possible consequences of the hearing and all the rights to which the person charged is entitled. Appellant was represented by counsel of his own choice and he pleaded "not guilty" to each of the two specifications and the charge. At the outset of the hearing, Appellant moved to dismiss the first specification on the ground that it pleads a compliance with section 322.4 as well as a violation of the same section.

The Examiner overruled the motion because the specification implies that Appellant did not answer a passing signal given by the SAUNDERS. Appellant then moved to dismiss the second specification on the ground that there are no facts set out in the specification which would constitute a violation of section 322.2 of the Pilot Rules for the Great Lakes. This motion was also overruled. In his opening statement, the Investigating Officer stated that he would attempt to prove, in support of the second specification, that Appellant failed to sound the danger signal when he should have done so.

The Investigating Officer rested his case after five witnesses had testified. Appellant renewed his motions to dismiss the two specifications and, again, both motions were overruled. Thereupon, Appellant took the stand as the only witness to appear in his behalf.

The Examiner reserved decision until he had an opportunity to review the evidence. In his decision, dated 6 April, 1949, the Examiner found both the specifications and the charge "proved". He thereupon entered an order suspending Appellant's license for one year - two months outright suspension and the balance of ten months to be on two years probation.

Appellant has been issued a temporary license pending determination of this appeal. There is no record of any previous disciplinary action having been taken against Appellant by the Coast Guard.

The points urged on appeal from the suspension order are as follows:

1. The first specification does not state facts which state a violation of the section named or which form a basis of the charge.
 - (a) Appellant is not responsible for the SAUNDERS' failure to reply to the DETROIT's one-blast signal.
 - (b) The specification violated 46 C.F.R. 137.05-10 since it does not allege facts which set forth the basis of any charge or offense.
 - (c) Courts have said that R. S. 4450 is a penal statute and, therefore, specifications on charges brought under R. S. 4450 must be strictly construed.
2. The second specification does not state any facts showing a violation of Section 322.2.
 - (a) The rule of strict construction applies and, hence, only proof of the facts alleged may be used to support the specification.
 - (b) The specification does not set out facts alleging either of the two possible violations of Section 322.2; namely: failure to sound a danger signal and failure to slow or stop.
3. Findings of Fact Nos. 6, 7, 9, 13, 15 and 16 are not supported by the evidence.
 - (a) Finding No. 6: The DETROIT was on the Canadian side and to the left of the SAUNDERS.
 - (b) Finding No. 7: The SAUNDERS was abreast Woodward Avenue when she exchanged signals with the BARKHAMSTEAD.

- (c) Finding No. 9: Incorrect because based on #6 and #7.
 - (d) Finding No.13: Not within the authority of the Examiner.
 - (e) Finding No. 15: The DETROIT stopped her engines upon hearing the two-blast signal of the SAUNDERS.
 - (f) Finding No. 16: The DETROIT was either stopped or going astern at the time of the collision.
4. The charge was not proved.
- (a) The first specification does not satisfy the rule of strict construction because it does not set forth facts necessary for a violation of Section 322.4 and the evidence does not sustain the language of the specification.
 - (b) As to the second specification, if Appellant violated Section 322.2 by failing to sound a danger signal, it was an error in extremis for which he should not be penalized.
 - (c) The evidence as to the point of collision proves that the DETROIT was abiding by the port to port passing agreement.
5. The order was excessive and unjust.
- (a) The order was to penalize Appellant for being involved in a collision and not for having violated a regulation or statute.
 - (b) Appellant's clear record for 34 years as a Master should be considered.

FINDINGS OF FACT

On the night of 8 and 9 August, 1948, there were five vessels on the Detroit River in the general vicinity of Detroit and Windsor when a collision took place between the SS DETROIT and the SS EDWARD N. SAUNDERS, JR. Three of these vessels were upbound on the Detroit River--The BARKHAMSTEAD, the McKERCHEY and the DETROIT. The BARKHAMSTEAD was farthest upstream and the other two upbound vessels were approximately abeam of each other.

The BARKHAMSTEAD was well on the south (Canadian) side of the channel which was this vessel's starboard side of the channel. The BARKHAMSTEAD was heading on a course of about 070° True at a speed not disclosed by the record. An upstream mid-channel course in the area of the collision would be roughly 065° True and the width of the channel about 1800 feet.

The McKERCHEY had entered the Detroit River from the Rouge River and was steaming up the river approximately 200 feet from the Canadian shore at a speed of seven miles per hour on a course of 070° True.

The carferry DETROIT had backed out of her Wabash Avenue slip on the north (American) side of the Detroit River about 1400 feet upstream from the Ambassador bridge and was heading upstream and across the river making good a course of approximately 075° True and speed of ten miles per hour while bound for the Canadian National carferry slip which is approximately 1 3/4 miles distant from the point of departure and on the south (Canadian) shore of the river.

The other two of these five vessels -- the SAUNDERS and the VANDOC -- were

downbound on the Detroit River.

The VANDOC had been overtaken by the SAUNDERS at the lower end of Belle Isle shortly prior to the time of the collision. The VANDOC was somewhat on the north (American) side of the channel on a course of approximately 250° True and steaming at a speed below eleven miles per hour.

The SAUNDERS was making eleven miles per hour on a course of 250° True at the time she had overtaken the VANDOC on the latter's port side. Shortly thereafter at Woodward Avenue, which is 5000 feet above the point of collision, the SAUNDERS checked speed to eight miles per hour and when she was abreast the Union Depot, (2100 feet above the point of collision) and in the middle of the river, she set her course for the middle of the Ambassador bridge. This meant a change of course to 245° True.

As well as can be gleaned from the record, the five vessels were in the following relative positions at the time the Detroit had backed out of the slip, and was under way to its destination.

The McKERCHEY was approximately abeam of the DETROIT. The DETROIT was close to the north shore and the McKERCHEY was close to the south shore. Both vessels were upbound and at least 1000 feet away from each other.

The BARKHAMSTEAD was upbound along the south shore approximately a mile ahead of the McKERCHEY and DETROIT and abeam of the downbound SAUNDERS which was in the middle of the river. The BARKHAMSTEAD and the SAUNDERS passed port to port.

The downbound VANDOC had previously been overtaken and passed by the SAUNDERS on the VANDOC's port side. Hence, the VANDOC was some distance astern of the SAUNDERS off the latter's starboard quarter.

The above positions indicate that the DETROIT was about a mile distant from the SAUNDERS at the time the former backed out of the slip and that the DETROIT was about twenty degrees off the starboard bow of the SAUNDERS.

On this night of 8 and 9 August, 1948, Appellant was serving, under authority of his duly issued License No. A-17001, as Master of the American SS DETROIT, a carferry with a registered length of 296 feet and a gross tonnage of 2220 gross tons. At 11:00 P.M. Eastern Standard Time on 8 August, 1948, the carferry DETROIT backed out of the slip on the north shore of the Detroit River and headed upstream bound for the slip about 1 3/4 miles distant on the south shore of the river. The DETROIT was loaded with twenty-three freight cars.

Although steering on Belle Isle Light, a course of 070° True, she was making good a course of approximately 075° True because the current was setting her over towards the south (Canadian) shore. The DETROIT maintained this course and her speed of ten miles per hour until the time collision with the SAUNDERS was inevitable. This course would take the DETROIT to a point about 200 feet on the Canadian side of the river at the time she crossed the New York Central Railroad tunnel over which the collision occurred. The river channel widens to about 1800 feet just beyond the point of departure of the DETROIT and remains approximately that width upstream beyond the scene of the accident.

On this night, the weather was clear and the visibility very good in this vicinity on the Detroit River.

The McKERCHEY remained in about the same relative position to the DETROIT from the time the latter left her slip up to the time of the collision between the DETROIT and the SAUNDERS.

The two downbound ships, the SS SAUNDERS and the SS VANDOC, were reported to Appellant as the DETROIT headed across the river. The SAUNDERS has a registered length of 504 feet and gross tonnage of 6,436 gross tons. She was carrying about 10,000 tons of iron ore at that time. The course she had set at the Union Depot for the middle of the Ambassador bridge, would cause the SAUNDERS to cross the tunnel at about the same point as the DETROIT would cross it. The SAUNDERS maintained this same course and speed until her engines were reversed shortly before the two ships collided. At about the time the SAUNDERS set her course, she exchanged one-blast whistle signals with the upbound BARKHAMSTEAD and they passed port to port. The DETROIT was about two points off the starboard bow of the SAUNDERS and on the American side of the river at this time.

Shortly after this and while the SAUNDERS was more than a half mile distant, Appellant sounded a one-blast whistle signal intended for the SAUNDERS since he thought the SAUNDERS' exchange with the BARKHAMSTEAD was intended for the DETROIT.

A moment later, the SAUNDERS sounded a two-blast signal intended for the DETROIT. There were no further signals sounded before the collision except for an additional two-blast signal by the SAUNDERS at some indefinite time.

Beyond the above facts, the testimony of the Master of the SAUNDERS and the Appellant are in irreconcilable conflict as to the courses of the two vessels. But it seems clear that the DETROIT did not sound the danger signal and that neither Master made any attempt to change the course or speed of his ship until it was impossible to avoid a collision. Hence, the DETROIT must have remained to starboard of the SAUNDERS at all times before they collided.

At 11:10 P.M. Eastern Standard Time, the two ships came together over the New York Central Railroad tunnel. It was stipulated that the collision occurred at the point marked on the chart which is the Investigating Officer's Exhibit #1. This shows that the collision took place about 500 feet off the Canadian shore over the tunnel. The evidence as to the course and speed of the two ships indicates that the collision took place slightly on the Canadian side of the middle of the channel. The Masters of the McKERCHEY and the SAUNDERS testified that the collision did occur at approximately the latter point. It was conclusively established that the port bow of the DETROIT and the starboard bow of the SAUNDERS were the points of impact.

OPINION

The basic arguments on appeal are that the findings of fact made by the Examiner are not based on the evidence and that both specifications are defective for two reasons: (1) They do not comply with the strict construction rule set up by the courts, and (2), They do not allege facts which set forth any offense.

Appellant contends (Point 3) that six of the Examiner's findings of fact are not supported by the evidence. Although there is considerable conflict in the testimony of the Appellant and the Master of the SAUNDERS as to the positions of their vessels and the signals sounded prior to the collision, there is sufficient evidence contained in the hearing record to substantiate the findings attacked by Appellant. It is not necessary that all the evidence agree with such findings but only that there be substantial evidence to uphold them.

In this connection, it was stated in the recent case of Kwasizur v. Cardille, 175 F. 2d. 235, 237:

"* * * It could hardly be claimed that the Deputy Commissioner was bound to accept the truth of the story, even though it were not contradicted, if it seemed to him, as the trier of facts, an improbable one.

We think therefore, if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a court."

In view of the finding that the SAUNDERS sounded a two-blast passing whistle signal, intended for the DETROIT, a moment after the DETROIT sounded a one-blast signal, there is no validity in Appellant's Point 1(a) in which he states that he was not responsible for the SAUNDERS' failure to reply to the DETROIT's one-blast signal. The evidence indicates that there was no passing agreement established primarily because the DETROIT failed to reply to the two-blast signal initiated by the SAUNDERS while she was over one-half mile distant from the DETROIT.

The first specification does not allege that Appellant was guilty of "negligence" for that the SAUNDERS did not reply to the signal given by the DETROIT. Because of Pilot Rule 24 for the Great Lakes, which states that the descending steamer shall have the right of away, the burden was on the DETROIT to make certain that a passing agreement had been established before proceeding up the Detroit River. It has been held that an ascending steamer in the Detroit River was guilty of fault for not steering clear of a descending vessel even though the former had checked her speed to 4 miles per hour and the proper signals had been exchanged. The George Presley (C.C.A. Mich. 1901), 111 Fed. 555. The court further stated that the ascending ship was bound to stop if the situation required it. In Griswold v. The T.W. Snook (D.C. 111., 1891), 49 Fed. 686, and The Lake Shore (D.C., Ohio, 1912), 201 Fed. 449, the ascending vessel was held in fault for disregarding the signals of descending vessels.

Appellant also contends (Point 1(b)) that the first specification violates Title 46 Code of Federal Regulations, Section 137.05-10, since facts are not alleged which set forth any offense. At the same time, Appellant states that the words used in the specification might well be a violation of Section 322.2. In agreement with Appellant's latter statement, it is true that the words "neglect to establish a passing agreement * * * before continuing your upbound course in Detroit River" are sufficient under the circumstances involved to uphold a charge of "negligence". Appellant was sufficiently informed of the offense charged by this specification so that he was enabled to properly prepare his defense. There was no element of surprise since Appellant was perfectly aware that the purpose of the hearing was to determine his guilt, or innocence, of negligence in connection with the collision.

The offense alleged in the first specification is not stated merely as a violation of Section 322.4 or as a violation of any other rule, regulation or statute.

7The charge is that Appellant was negligent because he continued his course up the river without establishing a passing agreement with a descending vessel. It is not necessary that the violation of any statute or rule be proved before Appellant is found guilty of this charge. Title 46 United States Code, section 239(g) authorized the Commandant of the Coast Guard to revoke or suspend merchant mariner's licenses when they have been found guilty of negligence, as well as for other reasons. A general definition of negligence is: "The failure to exercise such care as a reasonably prudent man of the same station and similarly situated would exercise under the same circumstances." Obviously, although the specification is not based upon the violation of any rule and such is not a requisite for the charge to be found "proved," the finding of negligence is substantiated when it can be shown that under similar circumstances the courts have stated that such conduct was a violation of some statute or rule which should have been obeyed. Therefore, in order to determine whether Appellant was negligent by continuing upstream without having established a passing agreement, his behavior may be considered in the light of all the pertinent rules of navigation under which he was operating on the Detroit River. It has been stated that all the navigation rules relevant to a given situation are to be construed together and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules, when it becomes evident that one is not so doing, it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision. United States v. Erie Railroad Co. (C.C.A. Mich. 1909), 172 Fed. 50. In the latter case, the Master was held to be at fault for not having taken precautions required by "special circumstances" referred to in Pilot Rules 27 and 28 for the Great Lakes.

In a case similar to the one under consideration, both vessels were held at fault for proceeding after the upbound vessel refused to answer the passing signal sounded by the downbound ship. The Norman B. Ream (C.C.A. Wis. 1918), 252 Fed. 409. The SS SENATOR was downbound on the St. Mary's River and sounded two two-blast whistle signals directed at the upbound SS REAM which was proceeding directly across the course of the SENATOR. The REAM sounded the danger signal but both ships remained on the same courses without any change of speed until too late to avoid a collision. It was held that the rule for passing agreements by signal, or for checking or stepping in lieu thereof, was applicable.

And in Duluth S. S. Co. v. Pittsburg S. S. Co. (C.C.A. Ohio 1910), 180 Fed. 656, the upbound steamer was said to be in fault for not stopping when it became apparent that the downbound vessel was navigating contrary to the passing agreement. Clearly, the DETROIT should not have proceeded when a passing agreement had not even been reached.

Since Appellant was confused as to the course and intention of the SAUNDERS, he was required by Pilot Rule 26 to stop the DETROIT until the course of the SAUNDERS was ascertained with certainty. The City of Erie (D.C. Ohio 1918), 250 Fed. 259; The New York (1899), 175 U.S. 187. In the latter case, it was said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must, ultimately, have some effect."

The "special circumstances" rules of the Great Lakes (Pilot Rules 27 and 28) may be invoked only when danger is imminent. But when there is immediate danger of collision, it is mandatory that these rules be invoked and that all concerned use every means in their power to avoid the threatened collision. The DETROIT and the SAUNDERS were on nearly parallel opposite, but slightly converging, courses. The relative courses of the vessels, the bearing of their lights and the manifest uncertainty as to the intentions of the SAUNDERS called for the highest degree of diligence on the part of Appellant with reference to the movements of the SAUNDERS. Since this was a case of the continuous approach of two vessels which had no passing agreement established, there was immediate danger of a collision and the "special circumstances" indicated that Appellant could only exercise the highest degree of caution by discontinuing his ship's upstream progress. The Manitoba (1886), 122 U.S. 97.

From the above cases, it can be seen that this charge of "negligence" is substantiated by the court decisions in other similar cases. But even without taking the court decisions into consideration, it is clear that Appellant did not conform to the standard of care set out in the above quoted definition of negligence. Hence, finding Appellant guilty of negligence for proceeding up the river under the then existing circumstances is certainly justified. It was required of Appellant that he stop the progress of his ship immediately when any danger arose. Certainly such danger occurred as a result of Appellant's failure to understand the intention of the SAUNDERS when the latter failed to respond to the one-blast whistle signal of the DETROIT. And by his own admittance, Appellant was confused as to the intentions of the SAUNDERS (R. 50). Consequently, he should have stepped, and reversed if necessary, until the danger of a collision had been averted. For not having taken such action, he is guilty of negligence.

Since the first specification is sufficient to support the charge of negligence regardless of whether the rule of strict construction advocated by the Appellant is applicable, I do not consider it appropriate to discuss his arguments (Points 1(c), 4(a)) concerning this rule.

But, in passing ever this, it should be pointed out that the rule of strict construction set out in the Bulger v. Bensen and Fredenberg v. Whitney cases is no longer applicable since R. S. 4450 was amended. The present statute is remedial and not penal in nature. For this reason, a liberal rather than a strict construction may be applied to the specifications.

Also, Appellant's contentions (Points 2, 4(b)) regarding the second specification need not be considered on their merits because of the adequacy of the first specification to sustain the charge.

CONCLUSION

Despite Appellant's clear record for a period of 34 years as a Master, I do not consider the order to be excessive or unjust in view of Appellant's negligence in the situation under consideration (Point 5).

ORDER

The Order of the Examiner dated 6 April, 1949, should be, and it is, AFFIRMED. In accordance with existing policy, the suspension ordered shall commence to run upon the expiration of the temporary license which has been issued to Appellant.

J.F.FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 13th day of Oct, 1949.